

*Before the Federal Communications Commission  
Washington, D.C. 20554*

In the Matter of:	)	
	)	
Advanced Television Services and	)	MB Docket No. 87-268
Their Impact upon the Existing	)	
Television Broadcast Service	)	

Directed to: The Commission

**COMMENTS**

Pappas Telecasting of America, a California Limited Partnership (“Pappas”) and South Central Communications Corporation (“SCCC”) (collectively, the “Owensboro Commenters”), by their attorneys, hereby respectfully submit their Comments in response to the *Seventh Further Notice of Proposed Rule Making* in the above-captioned proceeding, FCC 06-150, released October 20, 2006 (“*Seventh NPRM*”). With respect thereto, the following is stated:

1. Pappas and SCCC have pending applications for construction permit for a new NTSC television station to operate on Channel 48 at Owensboro, Kentucky (File Nos. BPCT-19960722KL and BPCT-19960920IV, respectively). Both Pappas and SCCC filed for the then-vacant channel as allotted at Owensboro, in accordance with the Commission’s announced rules and policies. Pappas and SCCC subsequently reached a settlement agreement and, on January 28, 1998, submitted a “Joint Request for Approval of Settlement Agreement.” The settlement agreement contemplates the grant of the Pappas application and dismissal of the SCCC application. In the interim, however, Channel 48 as specified in the applications has been reallocated for use as a DTV companion channel, thereby making that channel unavailable at Owensboro. Petitioners have been seeking a replacement channel since the reallocation took

place, only to have each potential replacement also become unavailable for allotment.

Owensboro Commenters have recently located an in-core DTV channel which can be allotted to allow the applications to go forward and a new television service to be provided at Owensboro. Their ability to go forward with seeking a change to this viable channel is limited at this time, however, due to the Commission's freeze on the filing of certain rule making petitions which propose changes in the television or DTV Table of Allotments. *Public Notice, "Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes,"* DA 04-2446, released August 3, 2004. Thus, although the Owensboro Commenters have found a technical solution which would allow for the grant of a construction permit for a new DTV station, their efforts have once again been stymied.<sup>1</sup>

2. The *Seventh NPRM* takes account of a number of the applicants that, like the Owensboro Commenters have had applications for new stations pending since 1996. The *Seventh NPRM* notes a number of the remaining, long-pending applications have been granted since the channel selection process started, and it has accommodated those permittees with Tentative Channel Designations ("TCD's"). The Commission also has announced a method by which it will award TCD's to other new permittees whose currently pending applications are granted prior to the adoption of the final DTV Table of Allotments. The Commission thus clearly has recognized the substantial amount of time and resources invested by such applicants over the last decade in their attempts to bring a new service to the public by providing such

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<sup>1</sup> The Owensboro Commenters have on file a "Petition for Rule Making" which seeks modification of the Owensboro allotment to specify the new DTV channel and a waiver of the filing freeze as necessary to allow the channel substitution to go forward at this time.

channels. The Commission has not taken into account, however, those applicants whose pending applications specify a channel which apparently is no longer viable for grant due to actions taken by the Commission post-filing. While the Commission could act to modify the affected allotments in the same way that it has awarded TCD's to new permittees, the applicants themselves are precluded by the filing freeze from petitioning for a different channel, even when a technically viable substitute channel is available.

3. As an initial matter, it must be noted that Pappas has been seeking for over ten years now to bring a new television service, representing only the second local television station and first local commercial television station, to the community of Owensboro. Pappas has followed announced FCC procedures throughout the prosecution of its application only to be thwarted at every turn by changes in FCC policies which required numerous changes in direction. These evolutions in policy due to developments in the implementation of DTV were changes clearly beyond the control of Pappas.

4. Pappas initially applied for an allocated analog channel 48 at Owensboro. This action was in accordance with the Commission's rules and policies, which specifically provided for the filing of applications for construction permits for new television stations on allotted channels up until a date certain. *Sixth Further Notice of Proposed Rule Making*, FCC 96-317, released August 14, 2006. Both Pappas and SCCC filed their applications prior to that deadline. In the Commission's *Sixth Report and Order* in this proceeding, FCC 97-115, released April 21, 1997, the Commission specifically stated that it would "maintain and protect those vacant NTSC allotments that are the subject of pending applications and will avoid creating DTV allotments that would conflict with proposed new NTSC allotments." *Id.* at ¶ 112. The stated rationale for

this decision was to “ensure that parties who have already begun to invest in new stations...may continue to pursue their ongoing station development projects. *Id.* Nonetheless, at the same time, channel 48 was allocated as the DTV companion channel for WKGB-TV, Bowling Green, Kentucky, thereby making that channel essentially unusable at Owensboro.

5. Accordingly, pursuant to the Commission’s *Public Notice*, 14 FCC Rcd 19559 (1999), Pappas joined with SCCC in filing a petition for rule making to substitute channel 47 for 48. Channel 47 then became unavailable due to a DTV maximization application, and the petition for rule making was amended to specify Channel 57, only to have that channel reallocated pursuant to the FCC’s lower 700 MHz proceeding.

6. Thereafter, pursuant to the FCC’s *Public Notice*, DA 01-270, rel. February 6, 2002, a further petition for rule making to substitute DTV channel 54 was filed. That *Public Notice* invited applicants in the position of the Owensboro Commenters to seek to substitute either in-core analog or out-of-core DTV channels for their existing channels. Only after the Owensboro Commenters responded to that invitation and filed their petition to substitute DTV channel 54, the determination was made that such pending petitions would not be granted. *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, FCC 04-192, released September 7, 2004. In sum, from the beginning, Pappas and SCCC have followed announced Commission procedures, only to have available channels subsequently made unavailable by Commission actions. They have repeatedly adjusted in the manner directed by the Commission, but the Commission’s actions in furthering the overall DTV transition have had the unfortunate effect of placing obstacles at every turn in the path of Pappas’s efforts to bring new service to the public as described herein. While these reversals resulted from larger decisions

concerning DTV implementation, they nonetheless were beyond the control of and could not reasonably have been anticipated by the Owensboro Commenters.

7. The Owensboro Commenters now have located a new substitute channel, as set forth in the attached Engineering Statement, and have filed a Petition for Rule Making, accompanied by a request for waiver of the filing freeze. The Owensboro Commenters therein have proposed to substitute DTV channel 35 for NTSC Channel 48 at Owensboro. This proposed facility provides the requisite level of protection to all tentative channel designations through the third round of DTV channel elections. While current analog facilities are not considered, as a practical matter, by the time that the proposed facility could be built and put into operation following allotment of the channel requested and processing and grant of the application for construction permit, the DTV transition is likely to be nearing its end. As the Commission is aware, the statutorily set deadline for cessation of analog broadcasting is February 17, 2009. At this point, that deadline is only approximately two years and one month away. Realistically, by the time that the instant petition could be processed and granted, and by the time that the application could be amended, processed, and granted, the time remaining until the end of transition will be substantially reduced, perhaps down to little more than a year, if that. The construction process itself would require time for completion as well. In any event, the time remaining until completion of the DTV transition is now less than the three year construction period specified in construction permits for new television stations. Accordingly, Pappas is willing to accept a construction permit which specifies that operation of the new Owensboro station would not commence until after the February 17, 2009, transition deadline.

8. The Owensboro Commenters thus would propose that the Commission allow

applicants situated as they are situated to file petitions for rule making at the current time, or by a date certain to be specified, to specify a channel which would be acceptable as a permanent channel post-transition. The Commission has indicated that it will make provision for TCD's for those stations granted construction permits in the interim before the final DTV Table of Allotments is adopted. Thus, the Commission clearly has indicated its intent to continue processing and granting currently pending applications as previously promised. This policy serves the public interest by providing for additional DTV broadcast service to the public and by allowing applicants which have expended over a decade's worth of time and resources to go forward with their projects to bring such new service to the public.

9. In the case of the Owensboro Commenters, a channel which would be viable as a post-transition channel has been identified, but the stumbling block remains the immediate grant of the construction permit which would allow for the designation of a TCD. As set forth above, despite the fact that the Owensboro Commenters followed Commission procedure in applying for an allotted channel, and despite repeated their efforts to find a substitute channel as provided by successive, subsequent Commission announcements, the channel now specified by the application is one which conflicts with a DTV allotment. Thus, if new service to the public is to be provided, the only choices at this point are either to grant the pending application as-is with the condition that a different TCD would be immediately located for post-transition use or to allow the filing of an immediate petition for rule making to change the channel. Either of these results would serve the public interest by providing for a new television station at Owensboro. Allowing the filing of a petition for rule making at this juncture, however, would essentially follow the plan outlined for newly granted construction permits and would provide both the same

opportunity for public comment and greater administrative orderliness. This policy could be adopted as a presumption in favor of a waiver of the current filing freeze for that quite limited number of applicants situated as are the Owensboro Commenters.

10. The number of such applicants is certainly both finite and ascertainable, and is bound to be quite small at this point. The group would include only such applicants as filed applications in 1996 for allotted channels only to have those channels made unavailable due to DTV allotments, which have previously sought substitute channels, and which entered into universal settlement agreements in 1998. After the passage of a decade, and with recent construction permit grants, the limited number ever included in this group is bound to have dwindled further. Moreover, adoption of this proposal to allow a small number proceedings to be commenced at this time, before the final DTV Table of Allotments is adopted and released, would enable any changes in channels to be included in that final Table. As noted above, the Commission already contemplates certain additions and changes to the draft DTV Table of Allotments released. The few additional possible changes would create no significant additional burden but would have the benefit of resolving long-pending matters at the commencement of finalized DTV operations rather than later on. This timing will serve the public interest by conserving administrative resources and providing earlier certainty. In addition, the timing of the additions of the new stations as a result of this proposal will assist in the DTV transition by adding new services just as DTV is being fully implemented, thereby further sparking local interest in DTV broadcasts.

11. Furthermore, it must be remembered that applicants such as Owensboro Commenters, which are involved in a universal settlement agreement reached and timely filed

during the statutory settlement period established by the Balanced Budget Act of 1997, are entitled to special consideration. Section 309(l) was added to the Communications Act of 1934, as amended, by Section 3002(a) of the Balanced Budget Act. That section directs the Commission to “waive any provisions of its regulations necessary” to permit settlements among mutually exclusive broadcast applicants to go forward. 47 U.S.C. §309(l) (emphasis added). Since the Settlement Agreement reached by the Owensboro Commenters cannot be effectuated without grant of a channel change, the Owensboro Commenters respectfully submit that the Commission is statutorily bound to grant a requested waiver to permit a change in channel.

12. Finally, there would be no public interest detriment as a result of Owensboro Commenters’ proposal. Any channel change petitions still should be required to demonstrate proper spacing and the requisite level of interference protection to all DTV facilities as set forth in tentative channel designations. Given that such facilities will be the only stations operating by the time the potential new stations would begin broadcasts, no additional protection to analog facilities should be required. Additionally, since there can be no more than a handful of parties with even remotely similar circumstances to those of the Owensboro Commenters, the Commission can anticipate little additional workload, amounting to only a few proposals, above those changes already contemplated. The substantial benefits of allowing for new DTV service just as the final transition to DTV operation is effectuated, combined with earlier certainty as to the final allotments to be included in the DTV Table, outweigh any slight incremental burdens which might result.

13. In sum, allowing the Owensboro Commenters to file and have granted a petition seeking a change in channel for their long-pending channel would serve the public interest by

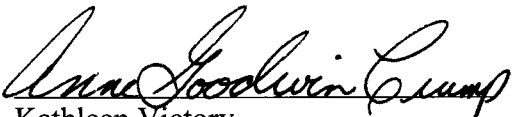


providing for earlier commencement of a new DTV station's service to Owensboro and environs, thereby adding a new local service and stimulating interest in DTV generally. Such approval also would provide an equitable outcome in a proceeding marked by reversals of fortune which were beyond the Owensboro Commenters' control or ability to predict. Finally, this outcome would be in accordance with the statutory mandate that the Commission take all necessary steps to allow implementation of the 1998 universal settlements.

Respectfully submitted,

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